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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

MARIE ELLSWORTH AND PAUL ELLSWORTH

PETITIONERS,

v.

CITY OF RACINE, A MUNICIPAL CORPORATION

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Questions Presented For Review

A. Whether a municipality's failure to provide adequate protection to an undercover police officer and his family which it knew or should have known were in danger as a result of the officer's investigation of illegal narcotics abuse is actionable under 42 U.S.C. Section 1983?

B. Whether negligence will support a claim for relief under 42 U.S.C. Section 1983 against a municipality for the denial of liberty without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

Parties To The Proceeding

The caption of this case contains the names of all parties to the proceeding in this case.

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Opinions Below

The opinion of the United States Court of Appeals is reported at 774 F.2d 182 (1985) and is printed in Appendix A hereto. The judgment of the District Court for the Eastern District of Wisconsin is reported at 592 F. Supp. 1262 (1985) and is printed in Appendix B hereto.

Jurisdiction

The judgment of the United States Court of Appeals was entered on September 22, 1985 and this petition for certiorari was filed within 90 days of that date. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. Section 1254(1).

Constitutional and Statutory Provision Involved

This case involves the Fifth Amendment to the United States Constitution which states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

In addition, this case involves the first section of the Fourteenth Amendment to the Constitution of the United States which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Finally this case involves 42 U.S.C. Section 1983 which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or

> immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Statement of the Case

This is a civil action seeking damages against the defendant, City of Racine, for committing acts and failing to act, pursuant to an officially adopted municipal policy or custom, which deprived plaintiffs of liberty without due process of law as secured by the Fifth and Fourteenth Amendments to the United States Constitution. The complaint filed by Marie Ellsworth and

Paul Ellsworth is attached hereto as Appendix C.

At all times relevant to this action, Paul Ellsworth was employed as a police officer, specifically as an undercover narcotics officer, with the Police Department of the City of Racine (Appendix C paragraph 11). As an undercover narcotics officer, Paul Ellsworth was an integral part of the City of Racine's investigation into illegal narcotics use and distribution (Appendix C paragraph 12).

Because of Officer Ellsworth's integral involvement in this narcotics investigation, and his anticipated trial testimony at the instance and bequest of his employer, City of Racine, Marie Ellsworth began to recieve threatening telephone calls, threatening letters and

cards instructing her to either have her husband stop his participation in the narcotics investigation or suffer harmful consequences (Appendix C paragraph 13).

As the narcotics investigation proceeded, Marie Ellsworth found that she was being followed by unknown individuals. These individuals made hand gestures which intimated that her life was in danger. In addition, they took non-consentual photographs of her and forced her car, as she was operating it, off the roadway. Further, these individuals shot at Paul Ellsworth while he was working in the driveway of his home and attempted to lure/push the Ellsworth's daughter into their car (Appendix C paragraph 14).

The Police Department of the City of Racine was advised of the above incidents by Marie and Paul Ellsworth (Appendix C paragraph 15) and as a result, the City of Racine expressly promised to provide protection for the Ellsworth family and officially assigned a police officer to protect Marie Ellsworth (Appendix C paragraph 16).

On July 21, 1980, while in the company of a police officer of the Racine Police Department, and while under that officer's protection, Marie Ellsworth and the assigned police officer observed an automobile drive slowly and suspiciously past the Ellsworth's house (Appendix C paragraph 18). At 6:30 p.m., after eight hours of duty, the police officer assigned to protect Marie Ellsworth left the company

of Marie Ellsworth, leaving her unprotected and with a false sense of security. Marie Ellsworth informed the police officer that she did not think it was necessary for her to stay. (Appendix C paragraph 11). However, even though Marie Ellsworth advised the police officer that it was not necessary for her to stay, the City of Racine knew that Marie Ellsworth was unsafe and unprotected, and it did not act to provide any other police protection to Marie Ellsworth. (Appendix C paragraph 21).

Later that evening, Marie Ellsworth was attacked by a masked individual allegedly involved in illegal narcotics use and/or distribution (Appendix C paragraph 26). This individual told Marie Ellsworth to "tell the pig to keep

his mouth shut." This remark was in reference to Paul Ellsworth's integral involvement in the narcotics drug ring investigation and the pending court trial involving one of the participating drug dealers (Appendix C paragraph 27). This individual then proceeded to savagely and severely beat Marie Ellsworth about the neck, back, legs and abdomen until and after Marie Ellsworth was rendered unconscious (Appendix C paragraph 28).

The United States District Court for the Eastern District of Wisconsin, upon motion by defendant, dismissed the complaint for failure to state a claim under 42 U.S.C. Section 1983 upon which relief may be granted. (Appendix B).

The petitioners appealed the District Court decision to the United States Court of Appeals for the Seventh Circuit. The Court affirmed the District Court's decision stating that no "special relationship" existed between the City of Racine and the Ellsworth family and therefore the municipality had no constitutional duty to protect the Ellsworth family (Appendix A).

Basis For Federal Jurisdiction In District Court and Court Of Appeals

The original jurisdiction of the United States District Court for the Eastern District of Wisconsin was invoked pursuant to 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343 in that

the action sought to redress the deprivation under color of state law, of a right, privilege or immunity secured by the Constitution of the United States. Further, the amount in controversy, exclusive of costs and interest exceeds $10,000, as is required by 28 U.S.C. section 1331 and 28 U.S.C. Section 1332.

The appellate jurisdiction of the United States Court of Appeals for the Seventh Circuit was invoked under 28 U.S.C. Section 1291 in that the petitioners appealed from the final judgment of the United States District Court for the Eastern District of Wisconsin granting the defendant's motions to dismiss the complaint for failure to state a claim under 42 U.S.C. Section 1983 upon which relief may be granted.

Reasons For Granting Certiorari

A. The ruling by the Seventh Circuit that the City of Racine did not have a constitutional duty to protect its undercover police officer and his family from a known risk of harm attributable to that officer's undercover investigation (1) conflicts with the decisions of other federal courts and (2) espouses a dangerous principle which so far departs from the accepted and usual course of judicial proceedings as to require the exercise of the Supreme Court's power of supervision.

At the outset it must be noted that in pleading a viable theory of municipal liability under 42 U.S.C. Section 1983,

two essential elements must be present. First of all, the conduct complained of must deprive a person of rights, privileges, or immunities secured by the Constitution. Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 428 (1981). Second, the conduct complained of must be committed by a person acting under color of state law. Parratt v. Taylor, supra. Specifically, with regard to municipal liability, the conduct complained of must be committed pursuant to the execution of a municipal policy or custom. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 3118, 57 L.Ed.2d 1145 (1978).

In the case at hand, the Seventh Circuit found that the first element stated above was not established. The

Court found that the City of Racine had no constitutional duty to protect the Ellsworth family and therefore the petitioners were not deprived of a right or privilege secured by the Constitution.\1

The petitioners respectfully request the Court to grant certiorari in this case because (1) the opinion of the Seventh Circuit conflicts with the decisions of other federal courts and (2) the decision espouses a dangerous

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1. Because the Court found that the first element of a Section 1983 claim was not present, i.e. there was no deprivation of a constitutional right, it did not reach the question of whether the conduct complained of was committed pursuant to a municipal policy or custom. See Monell v. New York City Dept. of Social Services, supra. The petitioners wish to reserve the right to present this issue to the Court should this petition be granted.

principal contrary to the accepted and usual course of judicial proceedings.

1. The opinion rendered by the Seventh Circuit in this case conflicts with the decisions of other federal courts.

In the case at hand, the Seventh Circuit indicated that "the City did not have a constitutional duty to protect Ms. Ellsworth" (see Appendix A p.6). This ruling conflicts with the decisions of other federal courts of appeals and with a decision of the United States Supreme Court

(a) The Supreme Court has not decided the circumstances under which a governmental entity has an affirmative

constitutional duty under the Fifth and Fourteenth Amendments to protect specific individuals from a known risk of harm.

The issue of whether the government has an affirmative constitutional duty under the Fifth and Fourteenth Amendments to protect specific individuals from a known risk of harm was before the Court in Martinez v. California, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980). In Martinez, the plaintiff was murdered by a parolee who had been sentenced to one to twenty years, but paroled by the State of California after five. The plaintiff brought an action against the State of California under Section 1983 for not protecting the plaintiff from or warning

the plaintiff of the potential risk of danger caused by the parolee's release and thereby causing the deprivation of the plaintiff's Fourteenth Amendment rights. Rather than directly addressing whether Martinez had a constitutional right to protection under the Fourteenth Amendment, the Court decided the case on proximate cause grounds. The Court found that the causal connection between the action of the parolee and the State was too attenuated to hold the government liable.

However, the Court left open the possibility that under proper circumstances the Fourteenth Amendment may provide the basis for a governmental entity's constitutional duty to provide protection to an individual exposed to a known risk of harm. The court stated:

> We need not and do not decide that a parole officer could never be deemed to "deprive" someone of life by action taken in connection with the release of a prisoner on parole. But we hold that at least under the particular circumstances of this parol decision, appellants' decedent's death is too remote a consequence of the parol officers' action to hold them responsible under the federal civil rights law.

444 U.S. at 285.

This petition presents an excellent factual situation for the Court to answer the questions left open in Martinez. In Martinez, the Court ruled that the element of proximate cause could not be established because the defendant was not aware that the victim "as distinguished from the public at large, faced any special danger." Id. at 285. Because proximate cause could not be established the Court found it

unnecessary to discuss whether the defendant had a constitutional duty to protect the victim. In this case, the element of proximate cause can be established. The City of Racine was aware that the petitioners were in danger. In fact, the City of Racine, by assigning Officer Ellsworth to undercover work placed the Ellsworth family in a position of danger. In addition, the City of Racine expressly promised to provide protection for the petitioners. Because the element of proximate cause is established, it is clear that the facts of this case will enable the Court to extend and refine the principles set forth in the Martinez decision.

(b) Although the Supreme Court has not decided the issue, several circuits have attempted to define the circumstances in which a governmental entity has an affirmative constitutional duty under the Fifth and Fourteenth Amendments to protect specific individuals from a known risk of harm.

Although the nature of the constitutional duty of the government to provide protection and the corollary constitutional right of an individual to receive governmental protection under the Fifth and Fourteenth Amendments was not decided by the Supreme Court, several circuits have attempted to define the contours of that duty. See Doe v. New York City Dept of Social Services, 649 F.2d 134 (2d Cir. 1981);

Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982); Humann v. Wilson, 696 F.2d 783 (10th Cir. 1983); Wright v. City of Ozark, 715 F.2d 1513 (11th Cir. 1983); Fox v. Custis, 712 F.2d 84 (4th Cir. 1983).

The generally accepted view among the circuits was stated by the Seventh Circuit in Bowers v. DeVito, supra, as follows:

> [T]here is no constitutional right to be protected by the state against being murdered by criminals or madmen. It is monstrous if the state fails to protect its residents against such predators but it does not violate the due process clause of the Fourteenth Amendment or, we suppose, any other provision of the Constitution. The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order.

Although in general, there is no affirmative constitutional duty on the part of the government to provide protection, such a duty may arise out of "special relationships" created or assumed by the state for particular persons. See Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984); Doe v. New York City Department of Social Services, supra; Wright v. City of Ozark, supra.

The contours of what constitutes a "special relationship" are in the words of the Seventh Circuit "hazy and indistinct" (See Appendix A p.6) and there is a definite need for guidance from the Supreme Court as to what elements are necessary to constitute a "special relationship."

(c) The ruling in this case conflicts with decisions of other federal courts and with a decision of the Supreme Court.

An examination of the ruling in this case vis-a-vis the rulings of other federal courts is illustrative of the confusion among the federal circuits as to what relationship constitutes a "special relationship".

In the case at hand, a municipal police officer and his family were endangered as the result of the officer's undercover probe into the narcotics underworld. In spite of the fact that the officer was an employee of the City, acting at the request of the City and acting for the benefit of the City, the Seventh Circuit found no

special relationship between the officer and the City. Accordingly, the Court ruled that the City had no constitutional duty to protect the Ellsworth family. Cf. concurring opinion of Judge Coffey Appendix A pages 8-9. The Court made this ruling even though the City placed the officer and his family in a position of danger, was aware of the danger and made express promises to protect the officer and his family.

The opinion rendered by the majority conflicts with similar decisions rendered by other federal courts. In In re Quarles, 158 U.S. 532, 15 S.Ct. 959, 39 L.Ed. 1080 (1895), the Supreme Court recognized a constitutional duty on the part of the government, on bases other than the

Fifth and Fourteenth Amendments, to protect those who assist it in preventing and/or detecting violations of the law. The Supreme Court stated:

> The right of a citizen informing of a violation of law, like the right of a prisoner in custody upon a charge of such violation, to be protected against lawless violence, does not depend upon any of the amendments to the constitution, but arises out of the creation and establishment by the constitution itself of a national government paramount and supreme within its sphere of action. . . . The right of a private citizen who assists in putting in motion the course of justice, and the right of the officers concerned in the administration of justice, stand upon the same ground, just as do the rights of citizens voting and of officers elected. . . . In both cases, it is the duty of that government to see that he may exercise this right freely, and protect him from violence while doing, or on account of so doing.

This postion was adopted by the Fifth Circuit in Swanner v. United States, 309 F.Supp. 1183 (1970). In Swanner, the plaintiff, an undercover employee of the Alcohol and Tobacco Tax Division of the Internal Revenue Service, brought a claim against the government under the Federal Tort Claims Act for failing to protect him and his family from retalitory acts of persons whom he gathered evidence against. The Court stated:

> The law is clear that whenever there is reasonable cause to believe that a government agent or employee, or any member of his family, is endangered as a result of the performance of his duty to the government, a duty on the part of the government to protect him and the members of his family arises. The duty arises without the necessity for a formal request on the part of the person or persons endangered. It arises upon the communication to the government of facts which

> would create a reasonable belief that a government employee, or his family, is endangered as a result of the performance of duty, and it is immaterial whether the information is received directly from those endangered or from some other source.

309 F.Supp. at 1187-1188.

For similar rulings see also Fair v. United States, 234 F.2d 288 (5th Cir. 1956); Schuster v. City of New York, 5 N.Y.2d 75, 180 N.Y.S.2d 265, 154 N.E.2d 534 (1958); Jones v. Phyfer, 761 F.2d 672, 646 (11th Cir. 1985); Reiser v. District of Columbia, 363 F.2d 462, 479 (D.C. Cir. 1977).

These two different approaches by federal courts on facts which are substantially similar demonstrate the lack of consistency within the circuits and the need for a controlling opinion by the Supreme Court. Accordingly the

petitioners respectfully request the Court to recognize the conflict and confusion among the courts on this issue and to grant this Petition for Certiorari.

2. The decision by the Seventh Circuit in this case espouses a dangerous principle which so far departs from the accepted course of judicial proceedings as to require the exercise of the Supreme Court's power of supervision.

The decision of the Seventh Circuit that a city is under no constitutional obligation to protect its undercover officers from known risks attributable to the officer's undercover assignment is a dangerous and grossly inequitable one. This decision will discourage

police officers as well as individual citizens from coming forward to assist in preventing crime. The decision suggests that undercover police officers and citizen informants who act for the public good in preventing or detecting crime are "on their own" when dangerous criminals make them the target of retaliation. In addition, the decision allows the City to reap the benefits of the law enforcement efforts of public minded citizens and then cast them aside to fend for themselves when they are faced with an identifiable danger as a result of their efforts. Rather than placing the burden of protection on the city -- the entity who benefits from the officer's action, the entity in the best position to provide protection and to spread the cost of providing protection

to the public -- the court places the burden on the individual. Finally, the decision, in finding no constitutional duty on the part of the City of Racine to protect Officer Ellsworth and his family, espouses principles directly opposite to those stated by Justice Gray in In Re Quarles, supra. The Quarles decision found that it is the constitutional duty of the government to protect those who assist in the prevention/detection of crime from identifiable risks of harm. The constitutional duty "does not arise solely from the interest of the party concerned, but from the necessity of the goverment itself, that its service shall be free from the adverse influence of force and fraud practiced on its agents." In Re Quarles, 158 U.S. at

1082. Accordingly, the petitioners respectfully request the Court to recognize that the Seventh Circuit has departed from the usual and accepted course of judicial proceedings and to grant this petition for certiorari.

B. The ruling by the Seventh Circuit that simple negligence may not give rise to a cause of action under 42 U.S.C. Section 1983 conflicts (1) with decisions of the United States Supreme Court and (2) with decisions of other federal courts of appeals.

The opinion in this case, following the precedent set by the Seventh Circuit, suggests that simple negligence may not give rise to a cause of action under 42 U.S.C. Section 1983 for

violations of rights under the Fifth and Fourteenth Amendments. This ruling conflicts with the decisions of other federal courts of appeals and with decisions of the United States Supreme Court.

1. The ruling by the Seventh Circuit conflicts with decisions of the United States Supreme Court.

The question of whether simple negligence may support a claim under Section 1983 for violations of rights under the Fifth and Fourteenth Amendments has been before the Supreme Court on a number of occasions. In Monroe v. Pope, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), the Court expressly stated that one need not prove

a specific intent to deprive a person of a constitutional right in order to allege a claim under Section 1983. The Court stated:

> In the Screws case we dealt with a statute that imposed criminal penalties for acts "willfully" done. We construed that word in its setting to mean the doing of an act with "a specific intent to deprive a person of a federal right." . . . We do not think that gloss should be placed upon [Section 1983] . . . The word "willfully" does not appear in [the Section]. Moreover [the Section] provides a civil remedy, while in the Screws case we dealt with a criminal law challenged on the ground of vagueness. Section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.

365 U.S. at 187.

The Monroe decision left unclear whether the Court intended to eliminate the state of mind requirement for

Section 1983 claims and thus left open the door to claims based on negligence. See Kirkpatrick, Defining a Constitutional Tort Under Section 1983: The State of Mind Requirement, 46 U.Cin.L.Rev. 45 (1977); Cook and Sobieski, Civil Rights Actions, Vol. 2 Sec. 7.09. In Procunier v. Navarette, 434 U.S. 555, 98 S.Ct. 844, 55 L.Ed.2d 24 (1978) and in Baker v. McCollan, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1970), the Court granted certiorari to determine "whether negligent conduct can form the basis of an award of damages under 42 U.S.C. Sec. 1983." 443 U.S. at 138. However, in both cases the Court found it unnecessary to reach the issue. In Procunier v. Navarette, the Court disposed of the case on immunity grounds and did not address whether

Section 1983 affords a remedy for the negligent deprivation of a constitutional right. 434 U.S. at 566. In Baker v. McCollan, the Court recognized the difficulty inherent in determining whether negligent conduct can form the basis of a Section 1983 claim. The court stated:

> Having been around this track once before in Procunier, supra, we have come to the conclusion that the question whether an allegation of simple negligence is sufficient to state a cause of action under Sec. 1983 is more elusive than it appears at first blush. It may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of an action.

443 U.S. at 139-140 Sec. 1983.

The Court, in Baker, however, ruled that the plaintiff was not deprived of a right secured by the Constitution and

therefore had not met his burden under Section 1983. Consequently, the Court again deferred consideration of the question whether simple negligence can give rise to Section 1983 liability. Id. at 140.

The issue was finally and conclusively decided by the Court in Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). The Court ruled that negligence can form the basis of a claim under Section 1983 for the deprivation of property rights secured by the Fourteenth Amendment without due process of law. In Parratt the Court ruled:

> Nothing in the language of Sec. 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights. In Baker v. McCollan, supra, we suggested that simply because a wrong was negligently as opposed to

> intentionally committed did not foreclose the possibility that said action could be brought under Sec. 1983.
>
> * * *
>
> Both Baker v. McCollan and Monroe v. Pope suggest that Section 1983 affords a "civil" remedy" for deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind.

51 U.S. at 534-535.

Thus, the Supreme Court has established that negligence can form the basis of a claim under Section 1983 for the deprivation of constitutional rights. The precedent followed by the Seventh Circuit that "simple neglience may not give rise to a cause of action under Section 1983," (Appendix A concurring opinion page 9) is clearly contrary to express rulings of the Supreme Court. Accordingly, the petitioners respectfully request the

Court to grant this Petition for Certiorari.

2. The ruling by the Seventh Circuit conflicts with decisions of other federal courts of appeals.

In spite of the Court's opinion in Parratt that negligent conduct can form the basis of a claim under Section 1983, there is a great deal of conflict relative to this issue among the federal courts of appeals. Several circuits follow Parratt and hold that negligence may support a cause of action under Section 1983 for violations of the Fourteenth Amendment. In addition, other circuits hold, in spite of the language contained in Parratt, that negligence claims are not encompassed

within Section 1983 and that an element of recklessness or gross negligence is required. Finally, a number of legal commentators and courts take the position that no uniform state of mind or intent standard can be applied to all Section 1983 claims. Rather, the court should focus on what state of mind or intent standard is imposed by the particular constitutional provision which is at issue in the Section 1983 case.

(a) The Courts of Appeals for the First, Fourth, Ninth, and Tenth Circuits have held that negligent conduct may support a Section 1983 claim for violations of the Fifth and Fourteenth Amendments.

First of all, it is apparent that several circuits have followed the Court's ruling in Parratt and have held that negligent conduct may support a cause of action under Section 1983 for violations of the Fifth and Fourteenth Amendment. In Hirst v. Gertzen, 676 F.2d 1252 (9th Cir. 1982), the Ninth Circuit stated:

> In Parratt, the Supreme Court held that negligent conduct by persons acting under color of state law may be actionable under 42 U.S.C. Section 1983. There is no express requirement of a particular state of mind in Section 1983. ... The complaint here clearly alleges that the actions were taken under color of state law and that there was a deprivation of life. We are, therefore, compelled to remand this matter for trial consistent with the views expressed in Parratt. We recognize that appellants' complaint alleges that defendants were grossly negligent. The pleadings were drafted prior to Parratt and at a time when it was

> reasonable to believe that the law requires something more than simple negligence to state a claim under Section 1983. The trial of this matter upon remand must be according to the law as interpreted by the court in Parratt.

676 F.2d at 1257.

The same view was expressed by the Tenth Circuit in McKay v. Hammock, 730 F.2d 367 (10th Cir 1984) as follows:

> Defendants argue that the allegations and evidence establish at most mere negligence and that negligence alone is insufficient to support a section 1983 claim. We conclude that a plaintiff need not necessarily address a defendant's state of mind to successfully articulate a Section 1983 cause of action because "[s]ection 1983, unlike its criminal counterpart, 18 U.S.C. Section 242, has never been found by [the Supreme Court] to contain a state-of-mind requirement." Parratt v. Taylor, 451 U.S. 527, 534, 101 S.Ct. 1908, 1912, 68 L.Ed.2d 420 (1981).

730 F.2d at 1373.

The Fifth Circuit and the First Circuit have rendered similar rulings. See Howard v. Fortenberry, 723 F.2d 1206, (5th Cir 1984) ("no particular state of mind is required to state a cause of action under Sec. 1983 for violations of Fourteenth Amendment rights; negligence will suffice." 723 F.2d 1209 n.6); Fernandez v. Chardan, 681 F.2d 42 (CA 1 1982) (Liability under Section 1983 may be based upon negligence alone).

(b) The Courts of Appeals for the Third, Seventh, Eighth, and Eleventh Circuit have ruled that simple neglience is not sufficient to support a Section 1983 claim for violations of the Fifth and Fourteenth Amendments.

Several circuits have held that simple negligence alone is not sufficient to support a Section 1983 claim. Generally, these courts require that the plaintiff show an element of recklessness, gross regligence or deliberate indifference on the part of a defendant in order to state a claim under Section 1983. The Seventh Circuit, in the case at hand, followed this approach when it ruled that "even assuming for the sake of argument that the city was negligent, Section 1983 `imposes liability for violations of rights protected by the constitution, not for violations of duties of care arising out of tort law.'" Accordingly, the Court ruled that the negligence of the City in this case was not sufficient to support a claim under Section 1983.

The concurring opinion also stated the position followed by the Seventh Circuit.

> Finally, the defendant's brief raises the issue of whether the City may be held liable for negligence in protecting the plaintiff even if state action and a "special relationship" are shown. This court has accepted the view that in a Section 1983 action the state of mind of the defendant is irrelevant. See State Bank v. Camie, 712 F.2d 1140, 1147 (7th Cir. 1983). Though simple negligence may not give rise to a cause of action under Section 1983, gross negligence clearly gives rise to a cause of action.

Appendix A at page 9.

The view that mere negligent conduct by governmental officials is insufficient to establish liability under Section 1983 was accepted by the Third Circuit in Davidson v. O'Lone, 752 F.2d 817 (3rd Cir 1984). The court interpreted the Parratt decision as follows:

Instead, what the Court did was reiterate the statements in Monroe v. Pope and Baker v. McCollan that Section 1983 was not limited to intentional deprivation of constitutional rights. That proposition is not the obverse of one stating that Section 1983 encompasses suits for negligence by state officials, because there is a broad range of actions between the two poles. Indeed, Justice Powell, concurring in the result in Parratt, observed that the Court "passe[d] over the threshold question - whether a negligent act by a state official . . . constituting a deprivation of property for due process purposes." Id. 451 U.S. at 547, 101 S.Ct. at 1919. Thus, nothing in the Court's opinion in Parratt leads us to conclude that the Court held that merely negligent conduct by state officials constitutes a constitutional deprivation encompassed by Section 1983.

* * *

We thus reaffirm that actions may be brought in federal court under Section 1983 when there has been infringement of a liberty interest by intentional conduct, gross negligence or reckless indifference or an established state procedure.

752 F.2d at 825, 828.

Other circuits have rendered similar rulings. See Doe v. New york City Dept. of Social Services, 649 F.2d 134 (1st Cir 1981) ("ordinary negligence by itself could not establish a cause of action under Section 1983. 649 F.2d at 143); Rankin v. City of Wichita Falls, Tex, 762 F.2d 444 (5th Cir 1985) ("the degree of negligence necessary to support a constitutional tort claim has not yet been determined by this court or the Supreme Court . . . However, . . . the complaint alleges conduct sufficiently careless to meet whatever standard of aggravated negligence is necessary to state a constitutional claim under section 1983"). Daniels v. Twin Oaks Nursing Home, 692 F.2d 1321 (11th Cir 1982); Mills v. Smith, 656 F.2d 337 (8th Cir. 1981).

(c) A number of courts and legal commentators advocate a "differential" approach to the question of what state of mind is required for Section 1983 claims.

In addition to the above two approaches, a number of legal commentators and courts have taken the position that no uniform state of mind or intent standard can be applied to all Section 1983 claims. Instead, it is suggested that the focus should be on what state of mind or intent standard is imposed by the particular constitutional provision which is at issue in the Section 1983 case. See McKay v. Hammock, 730 F.2d 1367 (10th Cir 1984); Kirkpatrick, Defining a Constitutional

Tort Under Section 1983: The State of Mind Requirement, 46 U.Cin.L.Rev. 45 (1977); Comment, Actionability of Negligence under Section 1983 and the Eighth Amendment, 127 U.Pa.L.Rev. 533 (1978). Note, Basis of Liability in a Section 1983 Suit: When is the State of Mind Analysis Relevant, 57 Ind.L.J. 459 (1982).

This approach was suggested by the Court's opinion in Baker v. McCollan and Parratt v. Taylor in which the Court differentiated Section 1983 claims based solely upon the Fourteenth Amendment from Section 1983 claims based upon the Fourth Amendment, Eighth Amendment, or other constitutional provisions. The Court stated:

> The only deprivation respondent alleges in his complaint is that "his rights under the Fourteenth Amendment of the Constitution of the

> United States were violated. That he was deprived of his property and Due Process of Law." As such, respondent's claims differ from the claims which were before us in Monroe v. Pope, which involved violation of the Fourth Amendment, and the claims present in Estelle v. Gamble, which involved alleged violations of the Eighth Amendment. . . . Respondent here refers to no other right, privilege, or immunity secured by the Constitution or federal laws other than the Due Process Clause of the Fourteenth Amendment simpliciter.

451 U.S. at 536.

Under this "differential" approach, if a constitutional provision incorporates an element of intent or scienter, that element becomes a necessary part of the Section 1983 claim. See Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). (A 1983 claim of cruel and unusual punishment under the Eigth

Amendment requires a showing of deliberate indifference on the part of prison officials.) However, if the constitutional provision does not incorporate an element of intent or scienter, that element is not a necessary part of the Section 1983 claim. See McKay v. Hammock, 730 F.2d 1367 (CA 10 1984); Parratt v. Taylor, supra, (a denial of due process may arise in the absence of a showing of intent).

This "differential" approach while accepted by legal commentators and the Tenth Circuit, has been criticized by the Third Circuit. According to the Third Circuit, the approach leads to inconsistency. The Court stated:

> Our holding avoids the anomalies that would result were a prisoner's Section 1983 suit such as this under the Fourteenth Amendment to be

judged under a lesser standard of care than the deliberate indifference standard applicable to a prisoner's Eighth Amendment claim, see Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), or were a prisoner to be entitled under the Constitution to a higher standard of care than an involuntarily committed mental patient, see Youngberg v. Romeo, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982).

Some members of this court believe that in circumstances such as those presented here, the Eighth Amendment standard is the same as that of the substantive due process clause of the Fourteenth Amendment, and that consistency demands that the Fourteenth Amendment not proscribe conduct the Eighth Amendment permits. See Williams v. Mussomelli, 722 F.2d 1130, 1132-34 (3d Cir.1979) (discussion of opinions applying similar standards in cases arising under the two amendments).

However, other members of the court believe the standard for liability under Section 1983 "may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations

> which might be the subject of a Section 1983 action." See Baker v. McCollan, 443 U.S. at 34-40, 99 S.Ct. at 2692.

Davidson v. O'Love, 752 F.2d at 829.

Accordingly, the question of whether negligence will support a claim for relief under 42 U.S.C. Section 1983 for the denial of liberty without due process of law has produced at least three different conflicting answers among the federal courts of appeals. These three approaches evidence a lack of uniformity and a great deal of confusion as to the proper application of negligence liability within the scheme of federal civil rights actions brought pursuant 42 U.S.C. Section 1983. The petitioner therefore respectfully requests the Court to grant certiorari and to issue a uniform authorative decision regarding whether

negligence will support a claim for relief under 42 U.S.C. Section 1983 for the denial of liberty without due process of law.

Conclusion

The petitioners respectfully request the Court to recognize that the opinion issued by the Seventh Circuit which held that the City of Racine is under no affirmative constitutional duty to protect its undercover police officers and their families from known risks of harm clearly conflicts with decisions rendered by other federal courts and espouses a philosophy which will impede law enforcement efforts in this country. In addition, the petitioners ask the Court to note the conflicting federal decisions regarding

the question of whether negligence can support a claim for relief under Section 1983. Accordingly, the petitioners respectfully request the Court to grant this Petition for Certiorari.

Dated at Milwaukee, Wisconsin this 6th day of January, 1986.

By: /s/ Linda S. Vanden Heuvel

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In the

United States Court of Appeals

For the Seventh Circuit

No. 84-2713

MARIE ELLSWORTH & PAUL ELLSWORTH,
Plaintiffs-Appellants,

v.

CITY OF RACINE, a municipal corporation,
Defendant-Appellee.

Appeal from the United States District Court for
the Eastern District of Wisconsin.
No. 84-C-751—Myron L. Gordon, *Judge.*

ARGUED APRIL 24, 1985—DECIDED SEPTEMBER 23, 1985

Before COFFEY, FLAUM, *Circuit Judges*, and GIBSON, *Senior Circuit Judge.**

GIBSON, *Senior Circuit Judge.* The plaintiffs, Marie and Paul Ellsworth, appeal from the district court's dismissal of their complaint on the basis that it failed to state a claim upon which relief could be granted. FED. R. CIV. P. 12(b)(6). We AFFIRM.

I.

Paul Ellsworth was an undercover narcotics officer employed by the Police Department of Racine, Wisconsin. Because of the testimony he was to give against individuals arrested as a result of an undercover investigation, Mr. Ellsworth and his family became the target of threats from underworld figures. In response to these acts of

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* Honorable Floyd R. Gibson, Senior Circuit Judge for the Eighth Circuit, is sitting by designation.

intimidation, the police department assigned an officer to protect Ms. Ellsworth for the eight hours each day that her husband was working. On July 21, 1980, Ms. Ellsworth and her bodyguard saw an automobile driving slowly past the Ellsworth home. At 6:30 p.m. the same day Ms. Ellsworth released her bodyguard from duty. Shortly thereafter, Ms. Ellsworth went into her backyard looking for her dog. While outside, she was attacked by a masked man who told her to "tell the pig to keep his mouth shut." The man beat Ms. Ellsworth severely.

The plaintiffs brought this action pursuant to the Civil Rights Act of 1871. 42 U.S.C. § 1983 (1982).[1] In their complaint, the plaintiffs alleged that the defendant City of Racine (City) denied Ms. Ellsworth her Fourteenth Amendment rights by negligently failing to provide her with round-the-clock police protection.

II.

The plaintiffs argue that the district court erred in dismissing their complaint, because it adequately stated a claim upon which relief could have been granted. The plaintiffs contend that, first, by deciding to provide Ms. Ellsworth with police protection, the police department either acted pursuant to an official policy or established an official policy on behalf of the City.[2] Second, because the

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[1] 42 U.S.C. § 1983 (1982) provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ..

[2] It is unclear what the plaintiffs perceive as the "policy" in question. At one point in their appellate brief, plaintiffs seem to argue that the decision to provide the protection is the policy at

(Footnote continued on following page)

Ellsworth family was endangered as a direct result of Mr. Ellsworth's work with the police department, the Ellsworth family had a special relationship with the City. Third, because of this relationship, the City had an obligation to protect Ms. Ellsworth from harm. Finally, by failing to protect Ms. Ellsworth adequately, the City "caused" an unjustified intrusion into her Fourteenth Amendment rights to bodily integrity and personal security. In other words, the City had a constitutional duty to protect Ms. Ellsworth, the City breached that duty, and, as a result, Ms. Ellsworth suffered great bodily injury. These allegations, plaintiffs argue, establish a claim for relief under § 1983 against the City. We disagree.

The sole issue on appeal is the sufficiency of the complaint. We take the allegations in the complaint to be true and view them, along with the reasonable inferences to be drawn from them, in the light most favorable to the plaintiffs. *Powe v. City of Chicago*, 664 F.2d 639, 642 (7th Cir. 1981). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff is unable to prove any set of facts which would entitle the plaintiff to relief. *Benson v. Cady*, 761 F.2d 335, 338 (7th Cir. 1985) *quoting*, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). It is true that the Federal Rules of Civil Procedure do not require a plaintiff to set out in detail the facts upon which a claim is based. *Conley*, 355 U.S. at 47; *Benson*, 761 F.2d at 338. Nevertheless, a plaintiff must allege sufficient facts to outline the cause of action, proof of which is essential to recovery. *Benson*, 761 F.2d at 338. We hold that the allegations in the plaintiffs' complaint

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[2] *continued*

issue. At another point, plaintiffs seem to suggest that the codified purpose for the establishment of a police department is the relevant policy for purposes of § 1983, and that the decision to provide Ms. Ellsworth with protection was made pursuant to that policy. Because we hold that the plaintiffs failed to allege facts which supported a claim for relief under § 1983, we do not reach the question of whether the police department acted pursuant to, or established, an official policy.

failed to outline the elements of a constitutional violation by the City.

One of the initial inquiries in a § 1983 case is whether the conduct complained of deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981); *Martinez v. California*, 444 U.S. 277, 284 (1980), *quoting*, *Baker v. McCollan*, 443 U.S. 137, 140 (1979); *Jackson v. Byrne*, 738 F.2d 1443, 1445-46 (7th Cir. 1984). The essence of the plaintiffs' complaint is that the City violated Ms. Ellsworth's Fourteenth Amendment rights to bodily integrity and personal security by failing to protect her adequately.

The plaintiffs acknowledge, as they must, that the concept of liberty found in the Fourteenth Amendment does not include a right to basic public services. *Jackson v. City of Joliet*, 715 F.2d 1200, 1204 (7th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 1325 (1984). That is, there is nothing in the Constitution which requires governmental units to act when members of the general public are in danger. *Jackson v. Byrne*, 738 F.2d at 1446.

> [T]here is no constitutional right to be protected by the state against [crimes committed] by criminals or madmen. It is monstrous if the state fails to protect its residents against such predators but it does not violate the due process clause of the Fourteenth Amendment or, we suppose, any other provision of the Constitution. The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order.

Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982). *See also Benson*, 761 F.2d at 339; *Jackson v. Byrne*, 738 F.2d at 1446; *Beard v. O'Neal*, 728 F.2d 894, 900 (7th Cir.), *cert. denied*, ____ U.S. ____, 105 S.Ct. 104 (1984); *Jackson v. City of Joliet*, 715 F.2d at 1204. However, the plaintiffs argue that Ms. Ellsworth was more than just a member of

the general public. Rather, by virtue of the fact that Mr. Ellsworth was a city police officer who encountered danger as a result of his work, the City had raised the Ellsworth family above the level of the general public and had entered into a special relationship with them. Once this special relationship was established, the argument continues, the City did have a constitutional duty to protect the plaintiffs adequately.

The issues involved in this argument are more complex than they may appear. We have recognized that a right and corollary duty to basic protective services may arise out of special relationships created or assumed by a municipality in regard to particular people. *Benson*, 761 F.2d at 339, *quoting*, *Jackson v. Byrne*, 738 F.2d at 1446-47. Specifically, we have stated that when a municipality puts an individual in a position of danger from private persons and then fails to protect that individual, it cannot be heard to say that its role was merely a passive one. The municipality is as much an active tortfeasor in such a situation as if it had thrown the individual "into a snake pit." *Bowers*, 686 F.2d at 618. Indeed, we have held that: the Constitution creates a duty on the part of police officers to protect minor children from immediate hazards after police officers arrest the children's guardian, *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979); state mental hospitals are required by the Constitution to protect patients from known risks of assault, *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974); police officers are required by the Constitution to render aid to a victim who is being beaten by the officers' colleagues, *Byrd v. Brishke*, 466 F.2d 6 (7th Cir. 1972); and that state prisons are required by the Constitution to provide prison inmates with basic protective services under certain circumstances. *See Benson*, 761 F.2d at 339; *Bowers*, 686 F.2d at 618. The relevant governmental organizations faced potential liability in each of these cases precisely because they had created or assumed special relationships with the plaintiffs involved in each case.

The contours of what constitutes a "special relationship" between a municipality, acting through its officials,

and its citizens are hazy and indistinct. We have tried to lend clarity to the concept when faced with the facts presented by individual cases. Upon reviewing the facts of this case, we are unable to include within the concept "special relationship" the relationship between the City and the Ellsworth family. There may be situations when a municipal employee and the municipality have, by virtue of the employment relationship, a special relationship for purposes of § 1983. In that case, the municipality would have a constitutional duty to provide elementary protective services to the employee. Thus, we in no way want to immunize municipalities from liability for duties they breach. We hold only that, given the facts of this case, the City had only assumed a limited special relationship with the Ellsworth family, providing a police officer assistance during certain periods of the day, *i.e.*, the City did not have a constitutional duty to protect Ms. Ellsworth. Also, there is a serious question of causation. The City did not harm Ms. Ellsworth; an unknown vindictive criminal did.

To require that police departments must, under the Constitution, provide each of its officers and their families with round-the-clock protection each time an officer receives a threat from criminals, would be to require the impossible. Police are faced with danger daily. They are responsible for the apprehension of criminals and, as a result, are the targets of retaliatory threats. Police departments simply do not have the resources to even begin to afford individualized protection to the officers and their families who are the subjects of these threats.

The City provided Ms. Ellsworth with a bodyguard for eight hours a day, each day for a number of weeks. Although the City did not have a constitutional duty to provide this service, the City was required to carry out the duty it had assumed in a non-negligent manner.[3] How-

[3] We note that the plaintiffs allege essentially that the City was negligent in failing to provide round-the-clock protection, not that the guards were negligent in the performance of their duty. However, under this factual situation we do not think there was any negligence on the part of the City.

ever, even assuming for the sake of argument that the City was negligent, § 1983 "imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles." *Baker*, 443 U.S. at 146; *accord*, *Bowers*, 686 F.2d at 619. *See also Jackson v. City of Joliet*, 715 F.2d at 1205. The alleged negligence in this case did not state a claim upon which relief could have been granted under § 1983. Thus, the district court properly granted the defendant's motion to dismiss under Rule 12(b)(6). Accordingly, the judgment is AFFIRMED.

COFFEY, *Circuit Judge*, concurring. Paragraph 20 of the plaintiff's complaint states that at the time the police officer assigned to protect the plaintiff left her on July 21, 1980, the plaintiff "informed the police officer that she [the plaintiff] did not think it was necessary for [the officer] to stay." I concur in the judgment because I believe this admission precludes recovery by the plaintiff on her Section 1983 claim. I write separately because I believe that if it were not for this admission, the plaintiff's complaint would state a cause of action under 42 U.S.C. § 1983 (1982).

A Section 1983 claim contains two elements. The first element is "the conduct complained of [must have been] committed by a person acting under color of state law." *Parratt v. Taylor*, 451 U.S. 527, 535 (1981) ("*Parratt*"). Conduct is "under color of state law" if it is committed pursuant to either the execution of an official policy such as a statute or executive decision, or a state custom. *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658, 690-91 (1978). The plaintiff's complaint alleges that "at all times relevant, the [city] acted under the statutes, customs, ordinances and usage of the State of Wisconsin, the City of Racine, and the Racine Police Department." I read this as alleging that the defendant acted pursuant to an official policy or custom when, through its officers in the

Racine Police Department, the defendant made the decision to provide the plaintiff with police protection. This satisfies the first element of a Section 1983 action.

The second element of a Section 1983 action is that the defendant's conduct must have deprived the plaintiff of rights, privileges or immunities secured by the Constitution of the United States. *Parratt*, 451 U.S. at 535. The due process clause of the 14th Amendment encompasses a right to be free from "unjustified intrusions on personal security" such as the plaintiff suffered at the hands of her attacker. *Ingraham v. Wright*, 430 U.S. 651, 673 (1976). *See also, White v. Rochford*, 592 F.2d 381, 383 (7th Cir. 1979) ("*White*"). Although the City has no general duty to protect members of the public from such danger, *Jackson v. Byrne*, 738 F.2d 1443, 1446 (7th Cir. 1984) ("*Byrne*"); *Jackson v. City of Joliet*, 715 F.2d 1200, 1203-04 (7th Cir. 1983) ("*Joliet*"); a constitutional duty to protect the personal security of specific members of the public exists under certain "special relationship[s]". *Byrne*, 738 F.2d at 1446-47. I agree with the majority that "what constitutes a 'special relationship' . . . [is] hazy and indistinct." However, I would not be as hasty as the majority to conclude that "[u]pon reviewing the facts of this case, we are unable to include within the concept of 'special relationship' the relationship between the city and the [plaintiff]."

A review of the cases suggests at least two factors to consider in deciding whether a special relationship exists. One factor that has been stressed is whether the danger which the defendant allegedly had a duty to prevent was directed at the public at large or only at a specific individual. *See Martinez v. California*, 444 U.S. 277, 285 (1980); *Fox v. Custis*, 712 F.2d 84, 88 (4th Cir. 1983). Another factor to consider is how closely the danger to the plaintiff is linked to actions of the defendant. *See Byrne*, 738 F.2d at 1446. Taking the allegations of the complaint as true, in the instant case, the defendant had clear notice of a specific danger to the plaintiff. The danger was limited to the plaintiff and her family and did not encom-

pass the general public. Moreover, the danger arose as a result of the City's actions in investigating and prosecuting illegal drug dealings in the City of Racine. I am not prepared to say that, given these allegations, no "special relationship" between the city and the plaintiff could be found in this case.

Finally, the defendant's brief raises the issue of whether the City may be held liable for negligence in protecting the plaintiff even if state action and a "special relationship" are shown. This court has accepted the view that in a Section 1983 action the state of mind of the defendant is irrelevant. *See State Bank v. Camie*, 712 F.2d 1140, 1147 (7th Cir. 1983). Though simple negligence may not give rise to a cause of action under Section 1983, gross negligence clearly gives rise to a cause of action. *White*, 592 F.2d at 385. Gross negligence in this context is ignoring a known, specific danger. *Id.* Taking the allegations of the complaint as true, the City could be found to have been grossly negligent when after having been informed of potential danger to the plaintiff, the City's police officer assigned to protect the plaintiff left her unguarded after the officer observed a suspicious automobile drive slowly past the plaintiff's home. However, because the plaintiff's complaint admits that she was left unguarded as a result of her own decision, I believe the City cannot be held responsible for failing to protect her from subsequent events. Accordingly, I concur in the judgment of the majority.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 50234—Pandick Midwest, Inc., Chicago—9-23-85—450

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

MARIE ELLSWORTH and
PAUL ELLSWORTH,

Plaintiffs,

-vs- Case No. 84-C-751

CITY OF RACINE, a
municipal corporation,

DECISION and ORDER

This action was brought pursuant to the Civil Rights Act of 1871, 42 U.S.C. Section 1983. The plaintiffs, Marie Ellsworth and her husband, Paul Ellsworth, allege that the defendant City of Racine (City) denied Mrs. Ellsworth her 14th Amendment right to due process of law by negligently failing to provide Mrs. Ellsworth with 24-hour protection on July 21, 1980, with the result that Mrs. Ellsworth was

APPENDIX B

beaten unconscious by an unknown assailant. Pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, the City has moved to dismiss the complaint for failure to state a claim. The motion will be granted.

For the purpose of testing a complaint under Rule 12(b)(6), all allegations are assumed to be true, and any inferences are drawn in the plaintiff's favor. Powe v. City of Chicago, 664 F.2d 639 (7th Cir. 1981). The complaint alleges that in 1980 Paul Ellsworth was an undercover narcotics officer employed by the Racine Police Department. Because of Mr. Ellsworth's activities as a participant in a narcotics investigation, Mrs. Ellsworth received threatening cards, letters and telephone calls. She was also

APPENDIX B

photogr·phed and followed by unknown individuals who made threatening gestures. On one occasion, Mrs. Ellsworth was forced off the road while driving. On another occasion, Mr. Ellsworth was shot at while working in his driveway.

In response to the acts of intimidation directed at the Ellsworths, the Racine Police Department assigned an officer to protect Mrs. Ellsworth for eight hours each day. On July 21, 1980, Mrs. Ellsworth and her assigned guard observed an automobile driving slowly past the Ellsworth home. At 6:30 p.m., Mrs. Ellsworth told the police guard that her services were no longer needed, and the officer left. Shortly thereafter, Mrs. Ellsworth went into her backyard in search of her dog. While

outside, she was attacked by a masked man who told her to "tell the pig to keep his mouth shut." Mrs. Ellsworth was beaten unconscious.

The 14th Amendment protects an individual's right to be free from "unjustified intrusions on personal security." Ingraham v. Wright, 430 U.S. 651, 673 (1977). The initial inquiry in a Section 1983 action is "whether the conduct complained of was committed by a person acting under state law." Parratt v. Taylor, 451 U.S. 527, 535 (1981). A public official is liable under Section 1983 "only if he causes the plaintiff to be subjected to deprivation of his constitutional rights." Baker v. McCollan, 443 U.S. 137, 142 (1979), quoting McCollan v. Tate, 575 F.2d 509, 512 (5th Cir. 1978)(emphasis in original).

In Martinez v. California, 444 U.S. 277 (1980), a violent criminal, one Thomas, having committed murder, had been dispatched to a state mental hospital pursuant to a 1 to 20 year sentence with a recommendation that he not be paroled. Five years later, the state parole board released Thomas, although "fully informed about his history, his propensities, and the likelihood that he would commit another violent crime." Martinez, 444 U.S. at 279. Five months later, Thomas tortured and killed a 15-year old girl. The girl's survivors brought an action under Sec. 1983. The Supreme Court held that the parole board could not be charged with having deprived the decedent of her 14th Amendment right to life because Thomas' crime was "too remote" from the state action:

> Regardless of whether, as a matter of state tort law, the parole board could be said either to have had a "duty" to avoid harm to [the] victim or to have proximately caused her death, [cites omitted], we hold that, taking these particular allegations as true, appellees did not "deprive" appellants' decedent of life within the meaning of the Fourteenth Amendment.
>
> ....
>
> [U]nder the particular circumstances of this parole decision, appellants' decedent's death was too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law.

Martinez, 444 U.S. at 285.

In Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983), the Court of Appeals for the Seventh Circuit upheld the district court's dismissal of a Section 1983 complaint which alleged that the defendants deprived the plaintiffs' decedents of their 14th

Amendment right to life when police negligently failed to pull them from a burning car after a highway accident. As in Martinez, the official action was deemed too remote from the deprivation to justify Section 1983 liability:

> Section 1983 has been read to take the command of the due process clause one step further by imposing liability on officers acting under color of, though contrary to, state law. But the concern is with the use of state-created power to kill rather than with the state's failing to prevent death. Ross's car ran off the road and burst into flames for reasons unrelated to the actions of any state officer....If the defendants deprived the plaintiffs' decedents of anything it was of some right to competent rescue services. But as we have been at pains to stress, there is no such right in the Fourteenth Amendment.

Jackson, 715 F.2d at 1204 and 1205.

Likewise in Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982), the Court of Appeals held that the estate of a murdered woman could not maintain a Sec. 1983 claim alleging that state mental health officials deprived the woman of her 14th Amendment right to life when they released her murderer, a psychotic individual who had previously been found not guilty of another murder by reason of insanity:

> There is a constitutional right not to be murdered by a state officer, for the state violates the Fourteenth Amendment when its officer, acting under color of state law, deprives a person of life without due process of law. [cite omitted]. But there is no constitutional right to be protected by the state against being murdered by criminals or madmen.... The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so

> elementary a service as maintaining law and order. Discrimination in providing protection against private violence could of course violate the equal protection clause of the Fourteenth Amendment. But that is not alleged here. All that is alleged is a failure to protect Miss Bowers and others like her from a dangerous madman, and as the State of Illinois has no federal constitutional duty to provide such protection its failure to do so is not actionable under section 1983.

Bowers, 686 F.2d at 618.

These cases indicate that state officials are not liable under Section 1983 for constitutional deprivations caused by third parties outside their control. A state may, of course, place upon state officials duties to take positive action to prevent infringement of citizens' rights by third parties and may create tort remedies for violations of such duties. Creation of state tort

liability, however, does not subject state officials to Section 1983 liability. "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." Baker v. McCollan, 443 U.S. 137, 146 (1979).

In the Martinez and Bowers cases discussed above, Sec. 1983 claims were rejected despite allegations that state officials' affirmative negligent acts (release of criminals) caused deprivations of constitutional rights. The argument for imposing liability is even weaker in the case at bar where state officials never had control over Mrs. Ellsworth's assailant. Mrs. Ellsworth was deprived of her liberty by an unknown assailant, not by an official

acting under color of state law. The state is alleged to be responsible only in that it failed to take special measures to prevent the attack. While the City's failure to act may constitute a violation of a duty of care under state law (I hazard no opinion on that issue), it did not "deprive" the plaintiff of her liberty in any constitutional sense.

The plaintiffs cite various decisions supporting Sec. 1983 liability based on negligence by state officials. Those cases do not undermine the result reached here. While Parratt v. Taylor, 451 U.S. 527 (1981), establishes that a Sec. 1983 violation requires no particular state of mind, the plaintiff's allegations must nonetheless demonstrate that the defendant caused

the deprivation. Moreover, an allegation of proximate cause sufficient under a state duty of care may be inadequate for purposes of Sec. 1983.

That the Ellsworths were endangered as a result of Mr. Ellsworth's performance of his duties under the direction of the Racine Police Department does not justify attribution of the unknown assailant's liberty-depriving attack to the defendant. The Court of Appeals for the Seventh Circuit has found state officials liable under Sec. 1983 for failure to protect only where the plaintiffs had been involuntarily deprived by the state of any means to protect their own constitutional interests. Wood v. Worachek, 618 F.2d 1225 (7th Cir. 1980)(deliberate

indifference to medical needs of prisoners); White v. Rochford, 592 F.2d 381 (7th Cir. 1979)(police abandoned children in car on expressway after arresting driver); Spence v. Stares, 507 F.2d 554 (7th Cir. 1974)(assault by other inmates).

Mr. Ellsworth, presumably with Mrs. Ellsworth's acquiescence, freely chose to undertake the potentially dangerous duties of a police officer. That danger eventually came the Ellsworths' way is far more the result of Mr. Ellsworth's choice than of the City's decision to conduct any particular investigation. The state may choose to provide special protections to employees in dangerous occupations; the 14th Amendment does not. The complaint must be dismissed because it does not adequately allege

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that the defendant deprived the plaintiffs of any constitutional right.

There is an alternative ground for dismissing the complaint. Under Monell v. New York City Department of Social Services, 436 U.S. 658 (1978), a municipality may not be held liable under Sec. 1983 based on the theory of respondeat superior. The allegedly unconstitutional acts must represent the municipality's official policy or custom. Even assuming that state officials could be held liable under Sec. 1983 for a deprivation of liberty caused by an unknown assailant, the municipality cannot be held responsible under Sec. 1983 because the complaint fails to allege facts indicating that the City followed a policy which exposed citizens or police officers' families to attack.

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Since the pre-July 21, 1980, procedures did not result in a deprivation of any right protected by the 14th Amendment, they must be assumed to have been constitutionally sufficient. Therefore, the complaint alleges only a single incident of unconstitutional conduct. In Powe v. City of Chicago, 664 F.2d 636, 651 (7th Cir. 1981), the court of Appeals for the Seventh Circuit held that the "allegation of a single incident of unconstitutional conduct by a municipal employee usually does not establish a sufficient basis for suing the municipality." If the plaintiffs had alleged a series or at least a few attacks on similarly situated persons, a city policy or custom of providing insufficient protection might be

inferred. In the absence of such allegations, however, any constitutional wrong that occurred may not be attributed to the City.

Therefore, IT IS ORDERED that the defendant's motion to dismiss be and hereby is granted.

IT IS ALSO ORDERED that this action be and hereby is dismissed, with prejudice.

Dated at Milwaukee, Wisconsin this 12th day of September, 1984.

/s/ Myron L. Gordon
Senior U.S. District Judge

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UNITED STATES OF AMERICA

EASTERN DISTRICT OF WISCONSIN

MARIE ELLSWORTH AND
PAUL ELLSWORTH her husband,
3716 Osborne Blvd.
Racine, Wisconsin 53405

Plaintiffs

-vs- COMPLAINT

CITY OF RACINE, Case No.
a municipal corporation
730 Washington Avenue
Racine, Wisconsin 53403

Defendants.

Plaintiffs, Marie Ellsworth and Paul Ellsworth, by their attorneys, Vanden Heuvel Law Offices by Linda S. Vanden Heuvel, 828 North Broadway, Suite 400, Milwaukee, Wisconsin, and by Attorney John J. Carter, 828 North Broadway, Suite 404, Milwaukee, Wisconsin, as and for a complaint

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against the above-named defendant states as follows:

JURISDICTION

1. This is a civil action seeking damages against the Defendant, City of Racine, for committing acts and failing to act, under color of law, which deprived Plaintiffs of liberty without

due process of law as secured by the 5th and 14th Amendment to the United States Constitution. The Court has jurisdiction of this action under 42 U.S.C. sec. 1983 and 28 U.S.C. sec. 1343.

2. The jurisdiction of this Court is further invoked pursuant to 28 U.S.C. sec. 1331. The amount in controversy, exclusive of costs and interest, exceeds $10,000.

3. Plaintiff, Marie Ellsworth, is a citizen and resident of the State of Wisconsin and a citizen of the United States, residing at 3716 Osborne Blvd., Racine, Wisconsin 53405, and is the wife of the Plaintiff, Paul Ellsworth.

4. Plaintiff, Paul Ellsworth, is a citizen and resident of the State of Wisconsin and a citizen of the United States, residing at 3716 Osborne Blvd., Racine, Wisconsin 53405, and is the husband of the Plaintiff, Marie Ellsworth.

5. Defendant, City of Racine, is a municipal corporation existing in accordance with the laws of the State of Wisconsin and located in the County of Racine, with principal offices located at 730 Washington Avenue, Racine, Wisconsin 53403.

6. The Plaintiffs have filed a written claim with the City Clerk of the Defendant, City of Racine, pursuant to secs. 62.25 and 893.80, Wis. Stats., prior to the commencement of this action. That 120 days have elapsed since the filing of the claim by the Defendant; and that said claim has been denied by the Defendant, City of Racine.

7. At all times relevant, the Plaintiff, Marie Ellsworth, was a resident of the City of Racine.

8. At all times relevant, the Plaintiff, Paul Ellsworth was a resident of the City of Racine and employed by the City of Racine Police Department.

9. That upon information and belief, at all the times material hereto, the Police Department of the City of Racine was and is a functioning

branch and arm of the Defendant, City of Racine, duly organized for the purpose, among other purposes, of the protection of the safety, life and property of the residents of the City.

10. That upon information and belief, at all times relevant, the members of the Racine Police Department were and are agents, servants, and employees of the Defendant, City of Racine.

11. That at all times relevant, the Plaintiff, Paul Ellsworth, was an undercover narcotics officer of the Police Department of the Defendant, City of Racine.

12. That as a member of the Police Department of the Defendant, City of Racine, amd at the instance, request and order of the Defendant, City of Racine,

the Plaintiff, Paul Ellsworth, was an active participant and integral part of an investigation relating to the illegal activities of narcotic drug dealers.

13. That because of the Plaintiff, Paul Ellsworth's integral involvement in this narcotics investigation, the Plaintiff, Marie Ellsworth, received threatening telephone calls, threatening letters, and cards. These calls, letters, and cards instructed the Plaintiff to have her husband stop his participation in the drug investigation and related activities, or she and other members of her family would be harmed.

14. As a further result of Plaintiff, Paul Ellsworth's integral involvement in the aforementioned drug investigation, which involvement was predicated and ordered by supervisory

agents, servants and employees of the Defendant, City of Racine, the Plaintiff, Marie Ellsworth, was followed by unknown individuals who made hand gestures which intimated that her life was in danger, who took threatening nonconsentual photographs of her, and forced her car, which she was operating off the roadway. That as a further result of Plaintiff, Paul Ellsworth's integral involvement in the said drug investigation, the Plaintiff, Paul Ellsworth, was shot at while working in the driveway of his home.

15. That the Police Department of the Defendant, City of Racine, was advised and had kowledge of these threats and attacks on the Plaintiff prior to and including July 21, 1980, the date of the physical attack by an

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unknown person upon the Plaintiff, Marie Ellsworth.

16. That because of the aforementioned threatening telephone calls, anonymous threatening letters and cards, and threatening personal contact, the Police Department of the Defendant, City of Racine, assigned for eight (8) hours during the day, a police officer to protect the Plaintiff, Marie Ellsworth.

17. That prior to the July 21, 1980, attack, the Defendant, City of Racine, its agents, servants, and employees had actual and constructive notice that the safety, life, limb, and mental and physical well-being of the Plaintiff, Marie Ellsworth was threatened, endangered, and imperiled by reason of the foregoing threats, and that said danger was imminent.

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18. That on July 21, 1980, the Plaintiff, Marie Ellsworth, while in the company of a member of the Police Department of the Defendant, City of Racine observed an automobile drive slowly and suspiciously past the Plaintiff's house.

19. That on July 21, 1980, the police officer of the Defendant, City of Racine, left the Plaintiff, Marie Ellsworth's company at about 6:30 p.m. That despite the imminent danger to the plaintiff, Marie Ellsworth, of which the Defendant, City of Racine, knew or should have known, no additional protection or body guard was provided to the Plaintiff, Marie Ellsworth, after the police officer left at 6:30 p.m.

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20. That at that time, the Plaintiff, Marie Ellsworth, informed the police officer that she did not think it was necessary for her to stay.

21. That even though the Plaintiff, Marie Ellsworth, advised the police officer that it was not necessary for her to stay, the police officer and the Defendant, City of Racine, its agents, servants and employees, knew or should have known that the Plaintiff, Marie Ellsworth, was not safe unguarded and unprotected.

22. Plaintiff further alleges that the Defendant, City of Racine, negligently allowed the Plaintiff, Marie Ellsworth, to go about unprotected from time to time and thereby giving her a sense of security.

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23. That the Police Department of the Defendant, City of Racine, led the Plaintiff, Marie Ellsworth, into feeling a false sense of security which caused her to feel free to go outside into her yard unprotected and unguarded in search of her dog on the evening of July 21, 1980.

24. The Plaintiff further alleges that the Defendant, City of Racine, knew or should have known that the Plaintiff, police officer Ellsworth, was an intricate part of an important and serious investigation into narcotic trafficking and that not only the Plaintiff, police officer Ellsworth's life was in danger but the life of his wife. Further, the Plaintiff alleges that the City of Racine Police Department knew or should have known of

the seriousness of the danger and that the danger to the Plaintiff was imminent in light of the rapidly approaching trial in which the Plaintiff police officer Ellsworth, was a material witness for the prosecution and conviction of certain individuals involved in drug trafficking.

25. The Plaintiff further alleges that the City of Racine Police Department knew of the threats to the life of the Plaintiff, Marie Ellsworth, and knew that the threats were serious in light of the nature of the investigation and further that the City of Racine Police Department knew that the Plaintiff, Marie Ellsworth's, life was in danger in light of the constant communication by unknown person or persons with her in writing, by

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telephone and in person. That the Defendant, City of Racine, ignored these threats and further ignored the safety of the Plaintiff, Marie Ellsworth. Further, Plaintiff alleges that the City of Racine Police Department knew or should have known that as a result of the marital relationship between the Plaintiffs there was a high probability that continued threats and actual violence against the Plaintiff, Marie Ellsworth, would be incurred unless adequate measures were taken to protect the safety of Marie Ellsworth.

26. That when the Plaintiff, Marie Ellsworth, was outside her home on the evening of July 21, 1930, she was attacked by a masked individual.

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27. This individual told the Plaintiff, Marie Ellsworth to "tell the pig to keep his mouth shut." That this remark was directed toward her husband's, Paul Ellsworth, integral involvement in the narcotic drug ring investigation and the pending court trial involving one of the participating drug dealers.

28. That during the attack of July 21, 1980, the Plaintiff, Marie Ellsworth was beaten severely about the neck, back, face, legs and abdomen, and rendered unconscious.

29. That the aforementioned att and injuries resulting therefor , resulted due to the Defendant, City of Racine, its agents, servants and employees negligence in recklessly and carelessly exposing the Plaintiff, Marie

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Ellsworth, to peril and danger; failing to adequately take due care and proper precautions for her safety; failing to properly guard and protect her; permitting the Plaintiff, Marie Ellsworth, to go about unprotected and unguarded; failing to provide her with adequate personal safety instruction; negligently and carelessly creating a false sense of security; minimizing the dangers involved by failing to provide twenty-four hours surveillance of the Ellsworth premises and Marie Ellsworth's person; and generally being reckless, careless and negligent.

30. That at all times relevant, the Police Department of the Defendant, City of Racine, acted under the statutes, customs, ordinances and usage of the State of Wisconsin, the City of Racine, and the Racine Police Department.

31. That as a direct and proximate result of the Defendant's, City of Racine's negligence, the Plaintiff, Marie Ellsworth, has been deprived of her right to liberty and property without due process of law in violation of the 5th and 14th amendments of the United States Constitution and 42 U.S.C. sec. 1983.

32. That as a direct and proximate result of the Defendant, City of Racine's, denial of the Plaintiff, Marie Ellsworth's, aforementioned constitutional rights, the Plaintiff, Marie Ellsworth, has sustained great injury of body and mind; that said injuries are permanent in nature; that the Plaintiff, Marie Ellsworth, has sustained severe emotional distress and will sustain such emotional distress in

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the future; that the Plaintiff, Marie Ellsworth, endured pain and suffering and will sustain such pain and suffering in the future; that the Plaintiff, Marie Ellsworth, incurred wage loss and will incur wage loss in the future; that the Plaintiff, Marie Ellsworth's, earning capacity has been impaired; that the Plaintiff, Marie Ellsworth's, enjoyment of life has been impaired and will be impaired in the future; that the Plaintiff, Marie Ellsworth, has incurred medical, hospital, psychiatric and dental expenses and will incur such expense in the future, all to her damage in the sum of Nine Million Five Hundred Thousand Dollars ($9,500,000.00).

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CLAIM OF PAUL ELLSWORTH

33. Plaintiff, Paul Ellsworth realleges paragraphs (1-32) as if fully set forth herein.

34. By reason of the aforementioned injuries received by his wife, Marie Ellsworth, because of the Defendant's negligence and denial of Marie Ellsworth's constitutional rights, Plaintiff, Paul Ellsworth, has sustained medical expenses and will sustain them in the future for and on behalf of his wife, that he has lost and will continue to lose her society, companionship and consortium, and her labor and services in and about their household, and will continue to do so in the future; all to his damage in the sum of Five Hundred Thousand Dollars ($500,000.00).

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WHEREFORE, Plaintiff, Marie Ellsworth, demands judgment against the Defendant, City of Racine, for damages in the amount of $9,500,000, plus the cost of this action and such other relief as this court deems just, proper and equitable; Plaintiff, Paul Ellsworth, demands judgment against the Defendant, City of Racine for damages in the amount of $500,000, plus the cost of this action and such other relief as this Court deems just, proper, and equitable.

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Dated at Milwaukee, Wisconsin this 7th day of June, 1984.

VANDEN HEUVEL LAW OFFICES

By: _____
Linda S. Vanden Heuvel
Attorney for the Plaintiff

Address:

828 North Broadway
Suite 400
Milwaukee, Wisconsin 53202
(414) 278-8828

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